SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 655

HELEN CORRINE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., ET AL,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORRINE SCALES TRICE, EXECUTRIX, PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968,

No. 666.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., Et Al.,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORINNE SCALES TRICE, EXECUTRIX, PETITIONER.

FOREWORD.

Justitia non novit patrem nec matrem; solam veritatem spectat justitia.

(Justice knows not father nor mother; justice looks at Truth alone.)

1 Bulst. 199.

MAY IT PLEASE THE COURT:

Respondents evade the question presented by Petitioner's application for the writ of certiorari in this case. The

Argument in support of the petition concluded with the following statement:

> "And, clearly it was beyond the power of the courts below to make the finding that plaintiff and her counsel wrongfully procured Nelson to change his testimony. The verdict of the jury on the first trial necessarily imports the finding that they **rightfully** did that, for they brought out the truth. No one will now gainsay that And yet, by a curious and unprecedented line of reasoning the Court of Appeals has reached the result of denying petitioner the jury verdict which resulted from a fair trial."
>
> **Petition, page 16.**

Respondents, in their brief in opposition to the Petition, do not dispute the above assertion. Instead, they assert that the previous denial of certiorari by the Court constitutes the "law of the case" and is not now subject to further review. In urging this proposition respondents are, of course, in grievous error. It would be carrying coals to Newcastle to spend time and space citing the well-nigh numberless authorities in which it has been declared that the refusal by this Court to grant certiorari imports no expression of opinion on the merits. Two of the most recent decisions so declaring are: **Polites v. U. S., 364 U. S. 426, 81 S. Ct. 202, 5 L. ed. 2d 173 and U. S. v. Shubert, 348 U. S. 222, 75 S. Ct. 277, 99 L. ed. 279.**

Respondents further assert that the present petition is nothing more than a reiteration of the prior petition and that it makes not a single complaint about the second action of the Court of Appeals. Respondents, apparently, labor under a very serious misapprehension of the petition. Petitioner is satisfied that her petition makes it entirely clear that the gravamen of her present complaint and application is that the Court of Appeals, in its opin-

ion on the appeal from the final judgment, referring to the action of the first trial judge basing his grant of a new trial in part on "prejudicial misconduct of counsel" said that the evidence upon which the judge relied was outlined in his opinion reported in **213 F. Supp. 675**, and that there was nothing in the record which would warrant a change in its opinion, and that "we adhere to it."

With respect to this finding of the first trial judge (concurred in by the court of appeals in its latest opinion) petitioners showed that: a) insofar as it involved a conclusion of law it was unsound (Petition, page 7) and b) as a conclusion of **fact** it was in contravention of the Seventh Amendment. Petitioner stated:

> "The principal fact tried before the jury in this case was whether James Nelson told the truth in the discovery deposition when he said he was hired by Joe W. Scales to set fire to the mill and that he did set fire to the mill, or whether he told the truth when he testified on the witness stand that this story was a pure fabrication. The jury on the first trial, after having heard all the evidence concerning Nelson's repudiation of his first statement, found that Joe W. Scales did not procure the burning of the mill. The jury on the second trial failed to agree. The fact tried by the jury, in this case has been re-examined by the courts and found contrary to the finding of the jury. On this basis, the courts below have held that the verdict of the jury cannot stand.
>
> "By the Seventh Amendment the fact tried by the jury and found in petitioner's favor could not be re-examined by the courts and found against her. But, this is precisely what has been done in this case.
>
> . . . . . .
>
> "The first jury found for the plaintiff after hearing both Nelson (and) the lawyer who took the orig-

inal statement about setting fire to hay and gasoline on his wire recorder.

"Judge Gray, the first trial judge, said that the jury was capricious to believe Nelson's testimony on the witness stand that he did not set fire to the mill. And now, the Court of Appeals has said that it has reviewed the evidence and approves Judge Gray's finding that plaintiff-appellant's counsel was guilty of unprofessional misconduct in interviewing Nelson after his discovery deposition had been taken and taking a sworn statement from him repudiating the whole thing."

Petition, pages 8, 14.

The Court of Appeals, in its opinion on the first appeal reversing the judgment notwithstanding the verdict, said:

"A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendant's motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property.

"Having concluded that the judgment notwithstanding the verdict should be set aside but that the trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. The action of the Trial Court in granting the judgment notwithstanding the verdict will be reversed but the order granting a new trial will be affirmed and the case remanded accordingly."

App. A18.

It is a settled rule that a judgment of reversal is not necessarily an adjudication by the appellate court of any

other than the questions in terms discussed and decided, and on second review all questions which appear on the record and have not already been decided are open for consideration. **Mutual Life Ins. Co. of New York v. Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. ed. 788; New York Life Ins. Co. v. Gamer (C. A. 9th), 106 F. 2d 375, 377; Hansen & Rowland, Inc. v. C. F. Lytel Co., Inc., et. al. (C. A. 9th), 167 F. 2d 998.**

The Court of Appeals, in its first opinion, did not in terms discuss and decide the question whether the trial judge abused his discretion in finding and holding that plaintiff's counsel was guilty of unprofessional misconduct in interviewing the defendant's witness, James Nelson, and obtaining from him a repudiation of his testimony on discovery deposition. But, on the appeal from the final judgment this very question was raised again and the Court of Appeals, this time, decided the question by the sweeping statement quoted above amounting to a concurrence with the findings made by the first trial judge which were the basis of the grant of the new trial to the insurance companies.

This concurrence is quite remarkable because of the new state of facts bearing on the finding of prejudicial misconduct of plaintiff's counsel presented by the record on the second trial.

Judge Gray, in his attempt to exonerate defendants' counsel for their conduct in obtaining the confession to burning the mill by James Nelson (which the jury had found to be false) by aspersing plaintiff's counsel said:

> "4. The statement obtained from Nelson was almost certainly false in its overall import and was unquestionably false insofar as it charged that D. C. Lee (one of defendants' attorneys) made up Nelson's prior confession story and obtained a recording of it by trickery.

"5. The witness (Nelson) subsequently perjured himself in this court in the course of testifying in support of the statement improperly obtained by Mrs. Trice and her counsel."

App. A50-A51.

As strange as it may seem, the defendants, on the second trial, abandoned the statement which Mr. Lee had obtained from Nelson for the first trial and came out with a brand new theory about how the fire could have been started with hay and gasoline without Nelson suffering any burns. This switch was fully shown to the Court of Appeals. Petitioner prints in an appendix to this Supplemental and Reply Brief pages 28-35 of her Main Brief in the Court of Appeals to demonstrate how baseless the "confession" obtained from Nelson by defendants' counsel was.

The "opinion" of the Court of Appeals, sustaining the grant of a new trial by the first judge was that he did not abuse his discretion because there was "substantial evidence in the record" which would have supported a verdict for the defendants*—a verdict the jury did not find (App. A. 18). And this on issues as to which the defendants carried the burden of proof!

The undisputed fact that the defendants, for the second trial, invented a claim about how the fire could have been

---

* The trial judge, in his memorandum opinion said: "Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported" (App. A 49). Elsewhere, in the opinion, the judge said: "Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice, and by obviously good reasons he had for that hostility" (App. A 48). The judge thought, too, that the fact that the property was **underinsured** was a "situation" which was "clearly one in which arson could have been profitable" (App. A 40).

started with gasoline wholly unsupported by any evidence and admitted this fact made no difference to the Court of Appeals. The very fact that the Court of Appeals was willing to disregard the fabrication of a new claim or theory by defendants' counsel for the second trial is alone enough to show that the judgment in this case is a mockery of justice. And, defendants endeavor to persuade this Court that the present petition "makes not a single complaint about the second trial in the District Court, nor about the second action of the Court of Appeals" (Reply Brief, p. 5).

Tennant v. Peoria.

Defendants cavil much about the rule so categorically expressed by this Court in **Tennant v. Peoria.** All manner of differences and distinctions are seen in their effort to conjure the rule away. The Court would have been spared wrestling with a greater portion of their brief, had defendants cited the case of **Duncan v. Duncan,** a decision by the Sixth Circuit Court of Appeals handed down on May 4, 1967, and reported in **377 F. 2d 49.** In that case a division of three judges of the same court of appeals reversed the same district court for an abuse of discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence when the defendant appealed from the final judgment in favor of the plaintiffs, citing the rule of **Tennant v. Peoria.** In the opinion of this division of the Court of Appeals, the following comprehensive statement of the law on the subject of the permissible limits of court action in granting a new trial on the weight of the evidence was made:

[1-5] In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence (Felton v. Spiro, 78 F. 576 (6th Cir. 1897) (Taft, J.), General American Life Ins. Co.

v. Central Nat'l Bank, 136 F. 2d 821 (6th Cir. 1943)), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence * * *." Aetna Cas. & Surety Co. v. Yeatts, 122 F. 2d 350, 352 (4th Cir. 1941), cited with approval in Turner v. United States, 229 F. 2d 944, 946 (6th Cir.), cert. denied, 351 U. S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956). The power of the trial judge to set aside a verdict as against the weight of the evidence and grant a new trial is thus a check or limitation on the jury's power to render a final and binding verdict, to the end that a miscarriage of justice does not result. However, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944); Werthan Bag Corp. v. Agnew, 202 F. 2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached. In applying these two broad principles defining the permissible limits of court action in granting a new trial on the weight of the evidence, the district judge must, as is generally stated, exercise his sound judicial discretion. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940); Devine v. Patteson, 242 F. 2d 828 (6th Cir.), cert. denied, 355 U. S. 821, 78 S. Ct. 27, 2 L. Ed. 2d 36 (1957), and cases cited infra. See generally 6 Moore, Federal Practice, ¶ 59.08 [5] (2d ed. 1953).

[6] Although an order granting a new trial is generally not appealable, it is clear that such orders are reviewable on appeal from the final judgment in the second trial. See North Texas Producers Association v. Metzger Dairies,

Inc., 348 F. 2d 189 (5th Cir. 1965), cert. denied, 382 U. S. 977, 86 S. Ct. 545, 15 L. Ed. 2d 468 (1966). Indeed, the order dismissing defendant's prior premature appeal stated that "the correctness of the District Court's order would be reviewable, of course, upon an appeal from the final judgment disposing of the case," citing Ford Motor Co. v. Busam Motor Sales, Inc., 185 F. 2d 531 (6th Cir. 1950).

[7] With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion. Cutter v. Cincinnati Union Terminal, 361 F. 2d 637 (6th Cir. 1966); Southern R. R. Co. v. Miller, 285 F. 2d 202, 85 A. L. R. 2d 842 (6th Cir. 1960); accord, Mooney v. Henderson Portion Pack Co., Inc., 339 F. 2d 64 (6th Cir. 1964); Werthan Bag Corp. v. Agnew, 202 F. 2d 119 (6th Cir. 1953); Spero-Nelson v. Brown, 175 F. 2d 86 (6th Cir. 1949). Cf. Trice v. Commercial Union Assur. Co., 334 F. 2d 673 (6th Cir. 1964), cert. denied, 380 U. S. 915, 85 S. Ct. 895, 13 L. Ed. 2d 801 (1965) ("clear abuse of discretion"); Turner v. United States, 229 F. 2d 944 (6th Cir. 1956); Hunt v. Standard Brands, Inc., 72 F. 2d 822 (6th Cir. 1934).

There are few cases where an appellate court has reversed a decision of a district court in either granting or denying a motion for a new trial based on the ground that the verdict was against the weight of the evidence. There is not, however, a complete lack of precedent for such action.

In Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F. 2d 532 (2d Cir. 1965), cert. denied, 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966), following the crash of one of defendant's planes, an action was brought for the wrongful death of one of the passengers. The flight

was international and thus liability, if established, was limited to $8,291.87 by the Warsaw Convention, unless the defendant was guilty of "wilful misconduct." The jury returned a verdict for defendant on all issues and the District Court granted plaintiff's motion for judgment n. o. v. as to liability, holding that the evidence established "wilful misconduct" as a matter of law. The district judge thus granted a new trial on the issue of damages, and also granted a conditional new trial on all issues should the judgment be reversed.

The court of appeals reversed the judgment in favor of plaintiff, stating:

> "We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct. Once the case went to the jury, its verdict should not have been upset, if reasonable men could find in defendant's favor, as they certainly could here," Id. 346 F. 2d at 538.

In reviewing and reversing the conditional grant of a new trial on all issues, based on the ground that the verdict was against the weight of the evidence, the court stated:

> "We have already held that there was sufficient evidence to go to the jury. * * * To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, Federal Practice, ¶ 59.08 [5], at 3817, 3820 (2d ed. 1953), but we find it was in this case. In light of the possible inferences as to what actually happened when the pilot began his letdown, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence."

The court then reinstated the original verdict in favor of defendant and set aside the judgment entered upon the second jury's determination of $924,396 damages.

In Lind v. Schenley Industries, Inc., 278 F. 2d 79 (3d Cir.) (En banc), cert. denied, 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960), a case procedurally similar to *Berner*, the jury returned a verdict in favor of plaintiff, and the district judge entered judgment n. o. v. for defendant, and conditionally granted a new trial in the event the judgment was reversed. On appeal, the court reversed the judgment and proceeded to review the order granting a new trial. The first ground specified in support of this order, that the verdict was contrary to law, had been disposed of by the ruling on the judgment; the second ground, that the verdict was the result of error in the admission of evidence, was decided in plaintiff's favor. With respect to the one remaining ground, that the verdict was contrary to the weight of the evidence, the court noted:

> "New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.
>
> * * * * * * * *
>
> "[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's ver-

> dict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.
>
> "Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices."

The court concluded that the district judge had substituted his judgment for that of the jury, thereby abusing his discretion, and the case was remanded back with instructions that the original verdict and judgment be reinstated.

The court in Fassbinder v. Pennsylvania R. R. Co., 322 F. 2d 859 (3d Cir. 1963) (En banc), held that the district judge had erred in failing to give effect to the inference of negligence warranted by the doctrine of *res ipsa loquitur*, and as a consequence had usurped the function of the jury. And in Georgia-Pacific Corp. v. United States, 264 F. 2d 161 (5th Cir. 1959), the court held the District Court's refusal to grant a new trial to be a clear abuse of discretion where the verdict was found to lack evidentiary support. See also Charles v. Norfolk & Western

Ry. Co., 188 F. 2d 691 (7th Cir.), cert. denied, 342 U. S. 831, 72 S. Ct. 55, 96 L. Ed. 628 (1951).

[8, 9] Appellant further contends that "in setting aside the verdict on the basis of his dissatisfaction with it [the district judge], lapsed into the inapplicable Tennessee practice, considered himself as a thirteenth juror and [thereby] committed a palpable error. * * *" Appellant seems to argue that isolated statements made by the district judge support this conclusion, but they may not properly be so viewed. Rather, those statements may only be considered in context and after having had due regard for the entire record, including particularly the evidence adduced at the first trial. Although a determination of this contention is not essential to the conclusion herein announced, it is observed that the argument is not supported by the record.

[10-12] Defendant's evaluation of the subject matter of this case as a "prime example of subject matter lying well within the comprehension of jurors" is deemed accurate. The first trial lasted less than two days, and there has been no showing that the jury considered any matter not properly before it. Moreover, plaintiffs' case of negligence against defendant could not be characterized as strong and it is clear that the credibility of plaintiffs' witnesses was in issue. In this respect it must be remembered that, as the court correctly charged the jury, the burden of proof in establishing negligence was on plaintiffs. The jury was not required to impose liability on defendant on the basis of the testimony of his wife and aged mother-in-law, and the jury's verdict in the first trial was, at the very least, a reasonable one. Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence.

[13, 14] The fact that the second jury which heard the case returned a verdict in favor of plaintiffs, thus "reinforcing" the decision of the district judge that the verdict for defendant was against the weight of the evidence, is of no significance here. See Fassbinder v. Pennsylvania R. R. Co., supra. Even the most inexperienced attorney is aware of the fact that the outcome of any given case depends in large part upon the particular jury hearing it. As was stated in American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co., 247 F. 2d 249, 256 (8th Cir. 1957), there with reference to an alleged error of law, "regardless of the different results in the trials, the function of this court is to review alleged errors and if [a party litigant] had become, in due course, vested with a valid judgment, they are entitled to have the action of the trial court which divested them of it reviewed for the alleged manifest error * * *."

For the foregoing reasons, the judgment in favor of plaintiffs is vacated, the order granting plaintiffs a new trial is reversed and the case is remanded back with instructions that the verdict and judgment in defendant's favor be reinstated.

Petitioner made a motion for a hearing before the Court of Appeals *en banc,* based principally upon the conflict between the decision of her first appeal and other decisions of the Sixth Circuit Court of Appeals. This motion is printed in the Appendix hereto. The motion was denied.

CONCLUSION.

Petitioner has shown that the Court of Appeals has decided an important question of federal law in a way that not only is in conflict with applicable decisions of this Court but which is also in conflict with its decisions in other cases. This surely ought to be good reason for granting certiorari

Respondents try to make petitioner, with her second appeal, appear to be like the importunate widow in the Bible (Luke, ch. 18). The comparison may not be wholly wanting in aptness. There is, however, an important difference. Luke's widow was appealing to an **unjust** judge. Petitioner believes that she is appealing to nine **just** judges.

Respectfully submitted,

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[redacted]

APPENDIX

EXCERPT FROM BRIEF OF PLAINTIFF-APPELLANT IN COURT OF APPEALS.

III.

(Question No. 4.)

4. Should the Motion of the Plaintiff-Appellant for a Directed Verdict in Her Favor on the Issue of Whether the Insured, Joe W. Scales, Procured the Burning of the Mill and for a Judgment n. o. v. on This Issue Have Been Granted?

The Lower Court Answered This "No."

Appellant Contends This Should Have Been Answered "Yes."

Plaintiff's motion for a directed verdict on this issue was as follows:

> "Mr. Farmer: If the Court please, the plaintiff, Helen Corrine Scales Trice, Executrix of the estate of Joe W. Scales, respectfully moves the Court to direct the jury to return a verdict in her favor on the arson issue on this ground:
>
> That the only evidence tending to show that Joe W. Scales procured the burning of this mill was the evidence of R. C. Jones, and the discovery deposition of James Nelson, according to which a fire was set by the spreading of hay in the mill and the pouring out of a great quantity of gasoline, and two men, standing there, Nelson and Watts, standing there in the room where they poured out this huge quantity of gasoline, in the summer time, and striking matches to it, and after the fire was caught, they saw it was caught, walking out, and that story, the plaintiff says, is so inherently improbable and impossible, contrary to

common knowledge, the laws of properties of gasoline that ordinary people possess, have, and that it is so incredible that it would not support a jury verdict if one were returned."

Plaintiff's motion for a judgment n. o. v. filed within 10 days after the jury was discharged in accordance with Rule 50 (b) appears in the Appendix at page 36a. Here, appellant asks the Court to turn to the Appendix and read this motion.

Mr. Joe W. Henry, Jr., one of the defendants' counsel, in his opening statement to the jury said they would prove that two men, Arthur Watts and James Nelson, went into the mill and set fire to it in the following manner:

"The proof will show there was a quonset hut in connection with that mill, approximately two hundred feet long, and that there was a conveyor belt that ran the entire length of that quonset building, a belt so wide (indicating), and they went down to the western end of that where the switch was that operated it with the hay and the gasoline being two hundred feet away down at the eastern end, and they just put a little dab of hay right on that conveyor belt and then they struck a match to it, and then they just flicked the switch and as the belt just gradually took the hay and the fire down there to where the other hay and gasoline was, these two men climbed a fence and ran away. That's what our proof is going to show to you; that's why we won't pay."

Tr. Vol. 1, page 80.

The foregoing statement contained some elements of truth, viz:

a) There was a quonset hut which was a part of the mill. This building was approximately 200 feet long;

b) There was a conveyor belt that ran the entire length of the building.

All the remainder of the statement was a sheer fabrication, as appellant will now demonstrate.

First, the switch which controlled the conveyor belt at the time of the fire was not located down at the western end. It was located at the eastern end in the seed cleaning room. This was where James Nelson, in every statement he ever made, said he and the white man started the fire.

On the second trial, plaintiff called Roy B. Arney, who was familiar with the mill. Mr. Henry, who cross-examined him for the defendants, sought to develop by him that the switch which turned the conveyor on and off was located down at the western end of the quonset hut. Mr. Henry stated, during the course of his questioning, that he had been out there on Sunday before (Tr. Vol. 7, pp. 1330-1333). Mr. Arney testified that the switch at the time of the fire was located about the middle of the floor of the seed cleaning room. This was at the eastern terminus of the conveyor. The switch was put out of operation by the fire which destroyed the seed cleaning room. After the fire another switch was installed down at the western end because it was necessary to get the conveyor back into operation in order to move some grain that was in the large bins on the west side which was getting hot (Appendix page 72a).

When he learned from Arney's testimony that the switch which he had seen down at the western end of the quonset hut, on Sunday, had been placed there **after** the fire, Mr. Henry excepted to the testimony and said:

> "We make no contention about where the switch was then or now, never had made any contention about it" (Appendix p. 72a).

Whereupon, counsel for plaintiff explained that the reason he had questioned Mr. Arney to prove the fact of the re-location of the switch was Mr. Henry's opening statement that the defendants would prove that Nelson and Watts went down to the western end of the quonset hut where the switch was that operated the conveyor "with the hay and gasoline being two hundred feet away down at the eastern end." Mr. Henry, at this juncture, finding himself a helpless victim of his own imaginative faculties, then hastened to say:

> "Mr. Henry: It's an obvious misstatement. I believe I said the eastern end at one time and the western end the next. I didn't know when I made the opening statement and don't know now, and have never known where that switch is, have no idea where it is" (Appendix 73a).

Secondly, Mr. Henry had not the slightest basis for the statement in his opening statement that Nelson and Watts went down to the western end and started the fire in the following manner:

> ". . . with the hay and the gasoline being two hundred feet away at the eastern end, and they just put a little dab of hay right down on that conveyor belt, and then they struck a match to it, and then they just flicked the switch and as the belt just gradually took the hay and the fire down there to where the other hay and gasoline was, these men climbed a fence and ran away. That's what our proof is going to show you; that's why we won't pay."

It is manifest that the reason Mr. Henry made the statement was that the defendants had realized they were not in position to contend that the story which they had obtained from Nelson when they took his discovery deposition on March 16, 1960, was credible. They realized this,

when their witness Gray Ragsdale was on the stand during the first trial (if not before). When Ragsdale, on cross-examination, was asked what happened when gasoline is spread out on the floor and you strike a match, he answered, "It explodes." Quick as a flash, Mr. Henry came back with a hypothetical question:

> "Q. It doesn't explode if you put the lighted hay down two hundred feet away until this travels up the two hundred feet conveyor belt and gets there, does it?" (Tr. Vol. 2, page 320.)

This idea was a figment of Mr. Henry's resourcefulness and inventive turn of mind at the time the question was put to Ragsdale on the first trial. It was still nothing more than that when Mr. Henry made his opening statement to the jury on the second trial. It was utterly devoid of any evidentiary support.

The defendants were bound to the fantastic, preposterous, incredible story they obtained from Nelson on his discovery deposition. There was no other evidence on the second trial to support a verdict on the arson issue.

When the plaintiff objected to the reading of the discovery deposition of James Nelson on the ground that the story the defendants wanted to offer was "so inherently incredible or improbable or idiotic that nobody could believe it", the trial judge ruled that

> "The Court: That would (be) for the jury, the jury could believe that he was mistaken on that detail, and the general purport——
>
> "Mr. Farmer: It wouldn't be mistaken, that is the crux of the whole matter, it's the heart of it.
>
> "The Court: That's a jury question.
>
> "Mr. Farmer: No, sir.
>
> "The Court: They may not believe a word of it.
>
> . . . . . .

"The Court: Because it's unbelievable in that aspect, therefore, I should exclude the whole thing?

"Mr. Farmer: That's the heart of it. **That's the way he said he did it, and if the way he said he did it is so incredible that no one can believe it, no court is bound by incredible evidence.**

"The Court: He could be mistaken on that. He stepped out of the door, could have, and thrown a match inside and run away. I don't know. That's a matter for the jury." (Emphasis added.)

Tr. Vol. 3, 430-431.

James Nelson was called as a rebuttal witness by the plaintiff. He testified that he did not burn the mill (Tr. Vol. 6, page 1043). Mr. Joe W. Henry, Jr., cross-examined him as follows:

"Q. All right. But now, James, I want to go on a little bit. You are denying then that you went out there and climbed the fence and poured gasoline out and put the little hay on the conveyor belt here, lighted it, and threw the switch and then went out this side door here and came out?

A. That's right."

Tr. Vol. 6, page 1051.

Watts was called as a witness by the plaintiff. He testified that he did not go into the mill and set fire to it and that the story told by Nelson on his discovery deposition was untrue.

While R. C. Jones, called as a witness by the defendants, testified that he helped to haul gasoline down to the mill for Mr. Scales to have it burned and tried to implicate Nelson and Watts in setting fire to the mill, he gave no direct testimony that they did this.

So, unless the story told by Nelson on this discovery deposition is worthy of belief by reasonable men, there

would be no substantial evidence which would have supported a verdict for the defendants. If Nelson's testimony on the witness stand was believed the whole story was a mere concoction. Without the story told by Nelson on discovery, Jones' testimony would not support a verdict.

After all the evidence was in, the defendants had only the "idiotic" story told by Nelson on his discovery deposition with which to carry the burden of proving that Joe W. Scales procured the mill to be burned. Mr. Henry had told the jury on the first trial they should not be deceived

> ". . . about this idiotic argument that they took those milk cans and poured the gasoline right down in the floor, and stood there and struck a match. Of course that didn't happen and no one ever suggested that happened."

But that is precisely the story that the defense lawyers had obtained from Nelson and which they had him tell on his discovery deposition. And, according to the story, Nelson and Watts after they saw that the fire was going good—a raging inferno it would have been—walked right back out the same door by which they entered the room unsinged. (See Excerpts from Nelson's discovery deposition in Appendix.) Nothing like that has happened since the three Hebrew children, Shadrach, Meshach and Abednego, walked in the fiery furnace!

This Court, in **Pennsylvania Co. v. Whitney, 169 F. 572, 574**, stated:

> "it is . . . well settled that testimony contrary to reason, or contrary to natural or physical laws, cannot support a verdict."

In **Hasson v. Com. Int. Rev., 239 F. 2d 778, 782**, this Court, in an opinion written by Judge Martin, said:

[5] In answer to the argument of petitioners that certain uncontradicted testimony should have been accepted with finality by the Tax Court, we refer to the statement of Mr. Justice Field in Quock Ting v. United States, 140 U. S. 417, 420, 11 S. Ct. 733, 734, 35 L. Ed. 501, that there "may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony." Cf.

The Circuit Court of Appeals for the Eighth Circuit in **Elzig v. Gudwanger, 91 F. 2d 434,** stated the general rule that neither court nor jury is permitted to believe that which is obviously untrue, saying:

[7] The rule that oral evidence which is opposed to undisputed physical facts is not substantial evidence—which is another way of saying that neither court nor jury is permitted to believe that which is obviously untrue—is well settled. Missouri, K. & T. Ry. Co. v. Collier (C. C. A. 8), 157 F. 347, 353, certiorari denied 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920; St. Louis Southwestern Ry. Co. v. Britton (C. C. A. 8), 190 F. 316; American Car & Foundry Co. v. Kindermann (C. C. A. 8), 216 F. 499, 502; United States v. Harth (C. C. A. 8), 61 F. (2d) 541, 544; United States v. Hill (C. C. A. 8), 62 F. (2d) 1022, 1025; Ed S. Michelson, Inc. v. Nebraska Tire & Rubber Co. (C. C. A. 8), 63 F. (2d) 597, 600, certiorari denied 290 U. S. 634, 554 S. Ct. 52, 78 L. Ed. 551; Chicago, M., St. P. & P. R. Co. v. Linehan (C. C. A. 8), 66 F. (2d) 373, 380; Liggett & Meyers Tobacco Co. v. De Parcq (C. C. A. 8), 66 F. (2d) 678, 683; Jacobson v. Chicago, M., St. P. & P. R. Co. (C. C. A. 8), 66 F. (2d) 688, 693; Booth v. Gilbert (C. C. A. 8), 79 F. (2d) 790, 795; Blackley v. Powell (C. C. A. 4), 68 F. (2d) 457, 459; F. W. Woolworth Co. v. Davis (C.

C. A. 10), 41 F. (2d) 342, 347; Chambers v. Skelly Oil Co. (C. C. A. 10), 87 F. (2d) 853, 856.

Appellant does not suppose that the suggestion made by Judge Miller that Nelson could have been mistaken about how the fire was started with gasoline and hay will be persuasive with this Court. A jury's findings must be based on evidence and cannot be supported by such speculation as that Nelson could have stepped out of the door and thrown a match inside and run away. Judge Miller had not heard Nelson's discovery deposition read when he said that.

MOTION FOR HEARING EN BANC IN COURT OF APPEALS.

No. 17,871.

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Helen Corinne Scales Trice, Executrix Under the Will of Joe W. Scales, Deceased,
Plaintiff-Appellant,

vs.

Commercial Union Assurance Company, Ltd., et al.,
Defendants-Appellees.

Appeal From the United States District Court for the Middle District of Tennessee, Columbia Division.

Motion of Appellant for Hearing Before the Court En Banc.

Comes the Plaintiff-Appellant, Helen Corinne Scales Trice, Executrix under the Will of Joe W. Scales, De-

ceased, and moves that the hearing of this case be before the court en banc upon the following grounds:

1. This appeal follows the second trial of this case. There was an appeal following the first trial. The opinion of the Court on the first appeal is reported as **Helen Corinne Scales Trice, Executrix v. Commercial Union Assurance Company, Ltd., et al., 334 F. 2d 673.** On the first trial the jury returned a verdict in favor of the plaintiff-appellant. The trial judge set the verdict aside on the ground that the verdict was contrary to the great preponderance of the evidence on the issues of (1) arson and (2) fraud, false swearing, willful concealment or misrepresentation. His action was upheld under the rule that the granting of a new trial upon the ground that the verdict is contrary to the evidence is a matter resting in the sound discretion of the trial court and its action is not reviewable upon appeal except upon a showing of a clear abuse of discretion.

2. On the second trial, the jury failed to return a verdict on the arson issue but found for the defendant insurance companies on the issue of fraud, false swearing, etc. Plaintiff's motions for a directed verdict in her favor and for a judgment n. o. v. on both issues were denied by the trial court. Also her motion to reinstate the verdict on the first trial was overruled.

3. In the case of **Duncan v. Duncan, 377 F. 2d 49**, this Court, through a panel of three circuit judges, reversed the district court for an abuse of discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence when the defendant appealed from the final judgment in favor of the plaintiffs. The decision in this case was rendered on May 4, 1967. It was not cited in plaintiff-appellant's brief on this appeal because her counsel did not know of the decision when the brief was prepared and filed.

4. The panel which heard the first appeal in this case was composed of two district judges with only one circuit judge. The opinion was written by one of the district judges. In determining that there was no abuse of discretion by the trial court in granting the defendant's motion for a new trial, it was stated that there was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property. Appellant, in her brief, contends that an improper criterion was applied in passing on the question of abuse of discretion by the trial court, for this reason: the trial court would not have been authorized to set aside the verdict on the first trial merely because there was some substantial evidence upon which the jury might have returned a verdict for the defendant on the two issues. The defendant insurance companies had the burden of proving their defenses of felonious burning and fraud and false swearing by even more than a **preponderance** of the evidence. Yet, this Court, on its review of the record, did not find that the evidence preponderated against the verdict—only that the defendants had introduced substantial evidence on the two issues. The substantial evidence test has heretofore been applied to sustain the verdict of a jury and a judgment of the trial court thereon. For example, this Court in **Cutter v. Cincinnati Union Terminal Co., 361 F. 2d 637,** correctly and properly intimated that the appellate court—even where the trial judge has refused to set a verdict aside upon the ground that it is manifestly against the weight of the evidence—would not be bound to uphold his action if it found that the verdict is without any evidentiary support. Thus, in effect, the Court, in the **Cutter case** held that the trial court did not abuse his discretion in refusing to grant a new trial since there was some substantial evidence to support the verdict of the jury.

Appellant believes that the opinion as the first appeal applying the substantial evidence test to justify **overturning** the verdict of a jury in favor of a party carrying the burden of proof by even more than a mere preponderance of the evidence stands alone, and is insupportable by any principle.

5. Appellant says that on the decision of the first appeal in this case upholding the grant of a new trial to the insurance companies upon whom rested the burden of proof of their defense of fraud by a more than the mere preponderance of the evidence **(Equitable Life Assurance Soc. v. Johnson, 81 F. 2d 543)** upon the ground that there was some substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing is palpably erroneous. Moreover, this decision is in conflict with the rule applied by this Court in the **Cutter** and **Duncan** cases.

6. Appellant says that the importance of laying down the correct rule on the appeal in this case and bringing the former opinion in line with the recent decisions of this Court makes it imperative that the Court hear this case en banc, as the Court of Appeals for the Third Circuit did in **Lind v. Schenley Industries, Inc., 278 F. 2d 79,** and **Fassbinder v. Pennsylvania R. Co., 322 F. 2d 859.**

Respectfully submitted,

Fyke Farmer,

Attorney for Plaintiff-Appellant.

ORDER DENYING HEARING EN BANC.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Helen Corinne Scales Trice, etc., Plaintiff-Appellant, v. Commercial Union Assurance Company, Ltd., et al., Defendants-Appellees.	No. 17,871.

Order.

Upon consideration, it is Ordered that the motion for a hearing en banc be and it is hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.